No. 92-1074

In The

Supreme Court of the United States

October Term, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK, as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

[redacted] BRIEF OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

SUSAN E. MARTIN
Counsel of Record for Amicus Curiae, In Support of Petitioner
ELLEN DOLLASE WILCOX
National Association of Insurance Commissioners
120 W. 12th Street
Suite 1100
Kansas City, Missouri 64105
(816) 842-3600

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CONSENT TO FILING

Both Petitioner and Respondent have consented to the filing of this brief of *Amicus Curiae*.

INTEREST OF AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association whose members consist of the principal insurance regulatory officials of the 50 states, the District of Columbia, territories and insular possessions of the United States. The NAIC is interested in filing this brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of insurance policyholders and claimants.

The Executive Committee of the NAIC, which consists of sixteen insurance commissioners from all regions of the country, voted to file a brief of *Amicus Curiae* in this action, on behalf of the full NAIC membership. The interest of the NAIC in filing this brief is based on the commissioners' collective interest in soliciting a decision by the Supreme Court of the United States, to reconcile the conflicting opinions of two different United States courts of appeals.

One such opinion was rendered by the United States Court of Appeals for the Second Circuit in *Harris Trust and Savings Bank v. John Hancock Mutual Life Insurance Company*, 970 F.2d 1138 (2d Cir. 1992). In this case, the

Second Circuit held that John Hancock had a fiduciary duty, pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 et seq. (1985) (amended 1992), with regard to the administration of funds allocated to the payment of nonguaranteed benefits maintained in the insurers' general account. *Harris Trust*, 970 F.2d 1138 at 1148.

This decision conflicts with an earlier decision by the United States Court of Appeals for the Third Circuit, rendered in a case with similar facts: *Mack Boring and Parts v. Meeker Sharkey Moffitt, Actuarial Consultants of New Jersey*, 930 F.2d 267 (3rd Cir. 1991). In this case the Third Circuit held that an ERISA fiduciary duty did not apply to administration of certain funds maintained for the payment of nonguaranteed benefits. *Mack Boring*, 930 F.2d 267 at 277.

The inconsistent application of ERISA fiduciary standards to insurers is of great concern to insurance regulators charged with regulating such insurers. The insurance commissioners are interested in encouraging the Court to resolve the conflicting application of ERISA standards. The NAIC respectfully seeks direction from the Court so that inconsistent and inappropriate regulation is avoided and the legal rights of insurance consumers are clarified.

SUMMARY OF THE ARGUMENT

The insurance commissioners in the various states have been charged with regulating the business of insurance and all persons engaged therein. McCarran-Ferguson Act, 15 U.S.C. Section 1012 (1945). They are, therefore, highly

interested in encouraging the Court's resolution of conflicting circuit court decisions regarding whether or not ERISA fiduciary standards apply to certain funds maintained by an insurer. As explained in more detail later in this brief, the Second Circuit has held that fiduciary standards are applicable, while the Third Circuit has held that they are not applicable.

In this case, resolution of the conflicting circuit court decisions would provide valuable guidance to insurance commissioners charged with regulating insurance companies. Additionally, insurance consumers would receive some sense of predictability through the Court's clarification of their legal rights.

ARGUMENT

I. RECENT DECISIONS OF THE SECOND AND THIRD CIRCUITS CLEARLY CONFLICT WITH EACH OTHER

As briefly mentioned earlier, recent decisions of the Second and Third Circuits clearly conflict with each other.[1] The United States Court of Appeals for the Second Circuit held in *Harris Trust* that John Hancock had a fiduciary

[1] Pursuant to Rule 10 of the Rules of the Supreme Court, the Court has discretion to review a case on Writ of Certiorari when there are special and important reasons therefor. Rule 10 indicates that conflicting circuit court decisions on the same matter may be considered by the Court as a reason for granting a Writ of Certiorari. James WM. Moore, *Moore's Federal Practice* 907 (1992).

duty, pursuant to ERISA, with regard to the administration of excess funds allocated to the payment of non-guaranteed benefits maintained in the insurer's general account. *Harris Trust*, 970 F.2d 1138 at 1148.

Pursuant to a Group Annuity Contract, premiums paid by Sperry, and later by Harris Trust, were deposited into Hancock's general account of corporate funds. An insurer's general account includes all assets and liabilities of its insurance and ancillary operations, except those assets and liabilities specifically allocated to separate accounts. From this account, the insurer pays operating expenses, general account policyholders, obligations to creditors, and dividends to policyholders. General account assets are often invested by insurers. *Mack Boring*, 930 F.2d 267 at 268.

The premiums paid by Sperry were for individual deferred annuities from Hancock for the Sperry retirement plan. Harris Trust, the successor trustee of the retirement plan, claimed that John Hancock violated its fiduciary duties under an ERISA provision which provides that one is "a fiduciary with respect to a plan to the extent . . . he exercises any discretionary authority or discretionary control respecting management . . . or disposition of its assets. . . . " ERISA, 29 U.S.C. 1002(21)(A).

An insurance company holding a guaranteed benefit policy in its general account, however, is exempt from such fiduciary duties. *Harris Trust*, 970 F.2d 1138 at 1142, citing ERISA, 29 U.S.C. Section 1101(b)(2). While the *Harris Trust* court conceded that Hancock had no fiduciary duties with regard to guaranteed benefits administered for Harris Trust, the court questioned whether other

funds, which are not guaranteed but are part of the overall Hancock/Harris Trust contract, are subject to ERISA fiduciary standards. Ultimately the court determined that fiduciary standards are applicable to such funds "to the extent that the insurer engages in the discretionary management of assets." *Harris Trust*, 970 F.2d 1138 at 1144.

In contrast, the United States Court of Appeals for the Third Circuit held in *Mack Boring* that the statutory exemption from fiduciary responsibilities extended "to the entirety of any contract under which any benefits are guaranteed, so that the exemption would apply regardless of the apportionment between the guaranteed component and the investment component of the contract." *Harris Trust*, 970 F.2d 1138 at 1144, summarizing *Mack Boring*, 930 F.2d 267.

II. CONGRESS DELEGATED TO THE STATES THE RESPONSIBILITY TO REGULATE INSURANCE

In 1945, Congress enacted the McCarran-Ferguson Act which dictates that the business of insurance and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business. 15 U.S.C. Section 1012 (1945). The official Declaration of Policy to this Act states that, "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest." McCarran-Ferguson Act, 15 U.S.C. Section 1011. The plain meaning of this statute evidences the delegation of insurance regulatory duties to the states.

In addition, most state insurance codes charge the respective state insurance commissioners with all rights and duties expressed or reasonably implied by the state laws, related to regulation of the business of insurance. *See, e.g.*, N.Y. Ins. Law Section 201 (McKinney 1987). Detailed state insurance statutes and regulations govern insurance company operations and maintenance of general accounts. *See, e.g.*, N.Y. INS. Law Sections 1402, 1403, 1409 (McKinney 1985).[2]

III. PUBLIC POLICY DICTATES THAT THE COURT RESOLVE THIS CONFLICT FOR THE ULTIMATE BENEFIT OF THE CONSUMER

Resolution by this Court of the conflicting decisions described herein would provide guidance to insurance companies for the future management of certain employee benefit funds. Direction from this Court would also aid insurance commissioners in their regulation of insurance company fund management. Additionally, insurance consumers would have some sense of predictability in knowing whether or not their benefits are ultimately subject to ERISA fiduciary standards.

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[2] Additionally, the NAIC accreditation program specifically requires state laws to regulate investments, liabilities, and reserves of insurers. NAIC, *NAIC Accreditation Reference Manual* (1992). States that meet these and other specific regulatory standards are eligible for accreditation by the NAIC.

CONCLUSION

The National Association of Insurance Commissioners strongly urges the Court to issue a Writ of Certiorari to ultimately reconcile conflicting circuit court decisions regarding the applicability of fiduciary standards to certain funds held by insurers.

Respectfully submitted,

SUSAN E. MARTIN
Counsel of Record for
Amicus Curiae,
In Support of Petitioner
ELLEN DOLLASE WILCOX
National Association of
Insurance Commissioners
120 West 12th Street
Suite 1100
Kansas City, Missouri 64105
816/842-3600